No. 15,003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 12, AFL,

Respondent,

Petition for Rehearing of an Order of the National Labor Relations Board.

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TOPICAL INDEX

AUTHORITY CITED

STATUTE

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Respondent petitions for rehearing herein and prays that the same, if granted, be heard *en banc*. This is a case of first impression.

The cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 15, 1955. The Court heard argument of respective counsel on July 10, 1956, and has considered the briefs and the transcript of record filed in this cause. On October 9, 1956, the Court, being fully advised in the premises, handed down its decision enforcing, as modified, the Board's Order.

The respondent prays for a rehearing on the grounds that a vital part of the record was not considered by the Court; and that the Court in finding that respondent Union violated Section 8(b)(2) of the Labor-Management Relations Act of 1947, has gone beyond the language of the Act and the intent of Congress.

I.

The Court Erred in Holding That Under the Circumstances Respondent Violated Section 8(b)(2).

In this regard, respondent notes that the Court, in making a determination that Holderby was discriminated against, relied upon a portion of the Trial Examiner's report which in fact holds to the contrary.

This honorable Court found:

> "With respect to Holderby, the Examiner found a correlation between his suspension from the union and lack of work referrals, but held that it was incumbent upon the General Counsel to show the availability of employment for which the claimant was qualified and a refusal by Local 12 to refer him thereto, in order to show discriminatory treatment within the meaning of the Act.
>
> " 'The Trial Examiner's intermediate Report stated: "Holderby's uncontradicted testimony is that he was always available for employment and indeed sat around the hall for months looking for jobs. This testimony is all the more impressive when his 1954 record is examined. Thus, for no apparent reason, and two days after the issuance of the complaint therein he is suddenly referred to a job for the first time in 11 months and is thereafter kept at work with the same general degree of frequency as he had been prior to his expulsion from the Union, while his name remains on the same list, *i.e.* the 'Applicants and Others' list. Then, when it becomes apparent that he will not drop the charge, but will continue the case, the supply of jobs is shut off just as abruptly as it started. There is no evidence that jobs suddenly became more available in June, that

jobs had not been available all along and the inference is unmistakable that his referrals to jobs was not based upon his location on the list without regard to other factors." ' "

Actually the Trial Examiner did not find that Holderby was available for employment. We cite the entire text of the Trial Examiner's conclusion on this point, commencing on page 21 of the transcript and reading as follows:

"Counsel for the Respondent points out that 'there is no showing in the testimony that there was any jobs available that Holderby might have filled which he did not obtain because of any failure of the Union to properly refer him out * * *' General Counsel attempts to answer this contention, originally raised during oral argument at the hearing, by contention that because of Holderby's work record on numerous jobs from July 14, 1952, through June 1953, 'accordingly, it stands to reason that from the period of July 1953, to June 1954, certainly some jobs must have become available to which he should have been referred but was not.' General Counsel also sees confirmation of this contention in:

"Holderby's uncontradicted testimony is that he was always available for employment and indeed sat around the hall for months looking for jobs. This testimony is all the more impressive when his 1954 record is examined. Thus, for no apparent reason, and two days after the issuance of the complaint herein he is suddenly referred to a job for the first time in 11 months and is thereafter kept at work with the same general degree of frequency as he had been prior to his expulsion from the Union, while his name remains on the same list, *i.e.,* the 'Applicants and Others' list. Then, when it becomes ap-

parent that he will not drop the charge but will continue the case, the supply of jobs is shut off just as abruptly as it was started. There is no evidence that jobs suddenly became more available in June, that jobs had not been available all along and the inference is unmistakable that his referrals to jobs was not based upon his location on the list without regard to other factors.

"This inference is not as 'unmistakable' as the General Counsel sees it because Holderby himself testified that, in addition to seeking work futilely from numerous employment agencies, he also sought work from a number of contractors individually during this same period and was told without exception 'no work' or 'not much work right now.' He was unable to secure employment in the construction industry even though the contractors had the right to request an employee by name. Holderby's own testimony made it clear that there was little work available in the construction industry around Los Angeles during the period he was supposedly available for work. In view of his employment by two motor companies, his availability for work in the construction industry becomes, at least, questionable. Holderby also acknowledged that he had been discharged by several contractors which might well have restricted the job opportunities for him. Nor does the work record after April 1954 appear to justify Holderby's claim of availability for he appears to have become quite particular about the referrals he would accept for it is to be noted that some referrals were refused by him as being 'too far' or because of a lack of sufficient transportation. The record seems to indicate something less than anxiety for employment on the part of Holderby."

From the foregoing it can be readily observed that there is insufficient evidence in the record to support the Board's finding of discrimination against Holderby based on the pattern of job referrals since he did not make himself available for employment during the period in question.

II.

The Court Erred in Holding That There Was Evidence of Violation of Section 8(b)(2) by Respondent.

In the original proceedings before the National Labor Relations Board, the dissenting member of the Board pointed out the majority of the Board had misread the language of Section 8(b)(2); that the Statute establishes that discrimination by an employer is a pre-requisite to a finding of unlawful causation under Section 8(b)(2) and that in fact there was no evidence of any kind to show discrimination or attempted discrimination by any employer.

Section 8(b)(2), by its own terms, forbids a union to cause or attempt to cause discrimination by an employer. Such discrimination cannot be read into the act by the mere refusal to dispatch an employee from the hiring hall, but there must be definite proof that the union attempted or caused an employer to discriminate.

We believe that Congress did not intend that there be read into Section 8(b)(2) an inference that by merely refusing to dispatch a man to a job the union was causing an employer to discriminate. In this regard we find that the dissent in this Court supports this view. We quote from the dissenting opinion by Mr. Justice Hastie:

> "I think the union's action with reference to Holderby did not constitute a violation of clause (2) of

Section 8(b). The issue under that clause is whether the union caused or attempted to cause any employer to discriminate against Holderby in violation of the Act. In resolving that issue it must be determined whether the union caused or attempted to cause an 'employer to engage in conduct which, if committed would violate Section 8(a)(3).

> "'That subsection makes it an unfair labor practice for an employer "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."' (29 U. S. C. Sec. 158(a)(3).)

"(Radio Officers' Union v. National Labor Relations Board, 1954, 347 U. S. 17, 53.)

"In this case no employer was told or even given reason to believe that Holderby or anyone else was being treated improperly in the matter of job referral. No one brought to any employer's attention any charge that the union was abusing the lawful referral arrangement to which various employers had subscribed. At most the union was accomplishing an effective discrimination against Holderby without causing or attempting to cause any employer to act improperly in any way.

"In this all important respect the present case differs from the numerous adjudicated cases in which the board and the courts have found violations of Section 8(b)(2). Those cases characteristically reveal either aggressive wrongdoing by the employer himself or his acquiescence and cooperation in making misconduct on the part of the union injurious to some employee.

> "'See *e.g.* National Labor Relations Board v. Local 803, International Brotherhood of Boiler-

makers, AFL, 3d Cir. 1955, 218 F. 2d 299 (On union demand the employer fired and refused to hire men not in good standing in the union); National Labor Relations Board v. International Union of Operating Engineers Local 101, AFL, 8th Cir. 1954, 216 F. 2d 161 (Employees discharged in accordance with union seniority rules though employer's rules provided otherwise); National Labor Relations Board v. Philadelphia Iron Works, 3d Cir. 1954, 211 F. 2d 937 (Union caused employer to withdraw job offer); National Labor Relations Board v. George Auchter Co., 5th Cir. 1954, 209 F. 2d 273 (Employer refused to employ applicant because of union's refusal to issue referral); National Labor Relations Board v. Bell Aircraft Corp., 2d Cir. 1953, 206 F. 2d 235 (Employee denied promotion because union charges pending against him.)'

"National Labor Relations Board v. International Longshoremen's and Warehousemen's Union, 9th Cir. 1954, 210 F. 2d 581, deserves special mention because it is a very recent decision of this court. But there too the employer was chargeable with knowledge of and responsibility for the misconduct of certain wrongdoing dispatchers, because those dispatchers were employees of the employer as well as the union and were subject to removal by an employer-union committee.

"In the present case the board has made a passing, but in my view unsuccessful, effort to charge employer complicity in or responsibility for the union's alleged wrongdoing. In a footnote the board refers to the employer's duty 'to insist that the union fulfill its contractual obligation of maintaining nondiscriminatory hiring lists'. I think it would be unfair and ir-

rational to impose such a duty unless and until the employer is at least put on notice that the union is improperly discriminating against someone in the making of referrals. And, I know of nothing in the Act of its history that suggests legislative intention to burden the employer with ferreting out union misconduct on penalty of being charged with complicity in that which he has not discovered.

"The foregoing analysis leads me to agree with the member of the board who dissented in this case that the record does not establish a violation of Section 8(b)(2)."

As the Honorable Abe Murdock said in his dissent in the proceedings before the Board:

". . . there is no act by any employer in the case which is even remotely related to discrimination against any employee. . . . In the instant case the majority's decision, in effect, converts discrimination by a union into discrimination by an employer. In my opinion, this goes beyond the literal language of Section 8(b)(2) and the intent of Congress in its enactment."

General Counsel for the Board admits that this question has not been decided before. We respectfully submit that the majority's opinion, in this case, extends the Taft-Hartley Act beyond what Congress intended and, therefore, that a rehearing should be granted.

Respectfully submitted,

David Sokol,
Attorney for Respondent.

Certificate of Counsel.

I, David Sokol, counsel for Respondent in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

David Sokol,
Attorney for Respondent.